

Summary of comments for ICWA Petition R-20-0003

Full Petition and Comments can be found here: <https://www.azcourts.gov/Rules-Forum/aft/1067>

Brandelle Whitworth
Shoshone-Bannock Tribe
Fort Hall, ID 83203
bwhitworth@sbtribes.com

...

“I can attest that bar licensure, pro hac vice fees, and/or the hiring of local counsel can be very cost prohibitive and often act as a bar to full participation of the very Indian tribes who’s rights were meant, in addition to the rights of the affected Indian children, to be protected by the Indian Child Welfare Act.

Although many tribes receive federal grants for child and family services, those funds cannot be used for legal representation or for legal fees for litigation. See, e.g., 25 U.S.C. § 1931(a)(8); 25 CFR §§ 89.40-41. Other federal moneys for social services are similarly restricted and cannot be used to pay for legal services for litigation. 25 U.S.C. §§ 450 et seq. This Rule amendment provides a solution to these funding restrictions. Accordingly, this proposed rule change would improve the welfare of Indian children in Arizona ICWA proceedings by ensuring that their tribes can meaningfully participate in Arizona proceedings related to their children.”

Hon. Ann A. Scott Timmer, Chair
Attorney Regulation Advisory Committee

...

“ARC supports Rule Petition R-20-0003 because it follows the Access to Justice strategic agenda of the Arizona Supreme Court.

The Federal Indian Child Welfare Act (ICWA), creates a right for tribal governments to participate in Arizona child custody proceedings but provides no funding to exercise that right. The presence of an attorney for an Indian nation from another state in an applicable ICWA case aids the Juvenile Court.”

...

“Under the proposed rule modifications, the Indian child’s tribe would be required to submit a pleading to the court seeking to intervene. The modification mandates that the non-member attorney seeking to appear for the tribe must file a motion to appear with the court in which the proceeding is pending. That attorney’s duties are well defined and limited to the ICWA case.”

Sunshine Whitehair
Senior Assistant General Counsel
&
Stephen Roe Lewis, Governor
Gila River Indian Community

“The Community considers that one of the primary purposes of 25 U.S.C. § 1911(c), which permits Indian tribes to intervene in state child custody proceedings involving their children, is that it gives Indian tribes a voice in state court proceedings where, historically, tribes have been left behind. Although the

Community is advantaged by its close proximity to Arizona courts, it has also appeared and intervened in ICWA cases involving its children in Alabama, California, Colorado, Idaho, Illinois, Iowa, Minnesota, Missouri, Nebraska, Nevada, New Mexico, Ohio, Oklahoma, Oregon, Texas, Utah, Washington and Wisconsin. Likewise, because of the size and diversity of the Phoenix metropolitan area, Indian children from many out-of-state Indian tribes are involved in child custody proceedings in Arizona. Generally, state courts welcome tribal attorneys in ICWA cases because of the specialized knowledge they bring to the proceedings.

The proposed amendment to Rule 39 facilitates the federal statutory right of Indian tribes to intervene in cases to which ICWA applies. As noted, *infra*, in-house attorneys for Indian tribes who are not state-licensed may appear in state court proceedings in any state because the federal right of an Indian tribe to intervene in cases to which ICWA applies preempts state regulation of attorney licensing.”

...

“No state interest is infringed by permitting in-house tribal counsel to appear and participate “in the narrow context of these ICWA proceedings.”¹ “

...

“Every reported appellate case on this issue holds that the right of an Indian tribe to intervene in an ICWA case outweighs the state interest in regulation of attorney admissions. And these cases were correctly decided. Any *pro hac vice* rule adopted in Arizona should reflect that its purpose is to facilitate the Indian tribe’s statutory right to intervene and participate and should impose minimal burdens and requirements on tribal attorneys.”

“The Community supports adoption of the proposed amendment, which seeks to follow the purpose and spirit of ICWA, to ensure consistency and ICWA compliance across all Arizona courts in child custody proceedings. In enacting ICWA, Congress specifically found that “the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”² Therefore, the participation of Indian tribes is imperative to ensure the proper application of cultural and traditional standards to the case and to the benefit of the children and families involved.”

...

“The proposed rule also makes sense in light of the law and recent Arizona policy in ICWA cases. The Community understands that several Arizona juvenile courts have begun discussions about implementing specialized ICWA courts, recognizing the need for consistency with these specialized proceedings.

Providing a *pro hac vice* exception for tribal attorneys in ICWA cases will lessen the financial and practical burdens on Indian tribes in appearing and participating in ICWA cases. Any *pro hac vice* rule permitting tribal attorneys to participate in ICWA cases must consider that many Indian tribes have limited resources. High *pro hac vice* fees and requirements to associate or appear with local counsel are significant burdens on an Indian tribe’s right to intervene and participate in ICWA cases. The time it takes to comply with such requirements works to the detriment of Indian children and families, as most state court dependency or abuse/neglect proceedings are subject to strict case deadlines. And, as noted, some parties

¹ *Id.*

² 25 U.S.C. § 1901(5).

may use this situation to attempt to exclude Indian tribes from participating in cases involving their children. To protect Indian children's best interests, Indian tribes, through their attorneys and representatives, must be able to intervene quickly as a matter of right, and be protected from frivolous unauthorized practice of law allegations.

Finally, early tribal participation increases the likelihood of compliance with ICWA.³ In the Community's experience, there are several reasons why early tribal participation in ICWA cases increases compliance with ICWA and produces better outcomes: (1) tribal attorneys and representatives are often more knowledgeable about ICWA than state agencies, particularly regarding determination of Community-specific standards or ICWA preferences; (2) Indian tribes have better access to locate tribal family placement options or other tribal-specific ICWA compliant placement options; and (3) Indian tribes can offer immediate knowledge or access to culturally appropriate services. The proposed rule is necessary because reducing costs and procedural steps for out-of-state tribes appearing in Arizona courts is beneficial for all agencies and parties involved and, most importantly, for the children involved in these hard cases."

Gary Aikten, Jr, Chairman
Kootenai Tribe of Idaho
Bonners Ferry, ID 83805
prentz@kootenai.org

...

"The Indian Child Welfare Act is a critical law that helps protect the best interests of our Indian children and promotes the stability of Indian tribes and families. ICWA recognizes that removing children from Indian communities harms children who are denied the benefit of tribal culture and community.

Removing barriers to tribal involvement in these cases will reduce the financial burden on Tribes' limited resources and help with early tribal involvement and better outcomes for our children."

Georgette Boggio
ICWA Counsel on behalf of Ft. Peck Tribes
Elk River Law Office, P.L.L.P.
Billings, MT 59101
gboggio@elkriverlaw.com

...

"If all state jurisdictions were to require local counsel association and fees for pro hac vice purposes from the Fort Peck Tribes in ICWA cases, the administrative and financial burden would substantially limit the Fort Peck Tribes' ability to advocate meaningfully on behalf of all their children.

Beyond the clear financial burden for the Fort Peck Tribes to hire attorneys all around the Country, multiple attorneys hamper the ability of the Tribes to efficiently maintain a consistent response for all their tribal children in ICWA matters. Each attorney would have to be brought up to speed on the cultural customs and norms of the Tribes along with current Tribal policies, procedures, and services regarding tribal children in dependency actions under ICWA.

³ *ICWA Baseline Measures Project Finding Report*, Capacity Building Center for Courts, Children's Bureau (2017).

Adoption of this amendment would improve the Fort Peck Tribes' participation in Arizona proceedings involving tribal children and allow for the best communication between all the parties, thus improving the outcomes for tribal children in the Arizona court system."

Doreen N. McPaul, Attorney General
Navajo Nation
Window Rock, Arizona 86515
dmcpaul@nndoj.org

...

"Children occupy a special place in Navajo society that can best be described as holy or sacred. The Navajo Nation believes it has obligations to its children for their family, culture and language to be preserved."

...

"The Navajo Nation has 191 cases in Arizona alone. There are currently 12 social workers and case managers in the ICWA Program and only one in-house attorney to handle all the ICWA cases nationwide. The Navajo Nation must hire contract counsel to assist in out-of-state cases, at significant cost to the Navajo Nation."

...

"At least six (6) other states have already adopted *pro hac vice* rules for ICWA attorneys, including Michigan, MCR 8.126(B), Oregon, UTCR 3.170, Nebraska, Neb. Rev. Stat. 43-1504(3), Washington, APR 8(b)(6), California, California Rules of Court 9.40(g), and Wisconsin, SCR 10.03(4)."

...

"The proposed amendment to Rule 39 is limited in scope and directly tailored to the need for tribal legal representation in ICWA cases. The proposed rule would eliminate the need for an out of state attorney to associate with local counsel and pay *pro hac vice* fees, but only in the following circumstances: 1) the attorney seeks to appear for the limited purpose of participating in ICWA proceedings; 2) the attorney represents an Indian tribe; and 3) the Indian tribe has submitted a pleading to the court seeking to intervene and confirming eligibility for membership. Thus, the proposed rule eliminates the financial burdens for a tribe to participate in ICWA cases by removing the significant fees (currently \$490 per case) and the need to hire local counsel (also a significant financial burden).

The Arizona courts already permit out of state social workers for tribes to participate in ICWA proceedings. Allowing tribal attorneys to participate in this limited capacity under the proposed rule will only increase the adequacy of representation and level of participation by out of state tribes in ICWA cases. Further, the attorneys would still be subject to the Arizona ethical rules and the supervision of the Court. Allowing the proposed rule change will not adversely affect the profession and could improve the level of representation in ICWA cases.

...

"The the adoption of a *pro hac vice* ICWA rule in Arizona makes it more likely that other states will follow suit and adopt similar rules. It is beneficial to both tribes and states and the overall well-being of a case for tribes to have adequate legal representation at all stages of an ICWA case."

...

“As noted above, the Navajo Nation is the largest Indian reservation in the United States, and it spans three (3) states and borders another. The Navajo Nation ICWA Program is primarily represented by the Navajo Nation Department of Justice (NNDOJ) in state courts. All NNDOJ attorneys must be licensed on the Navajo Nation and one state jurisdiction. Generally, this means NNDOJ attorneys are licensed in the neighboring states, Arizona, New Mexico, or Utah. The current NNDOJ attorney assigned to ICWA cases is licensed in New Mexico. Other NNDOJ attorneys assist with ICWA cases as needed. Thus, at times, the NNDOJ attorney assigned to an ICWA case may not be licensed in Arizona. The rule would allow the NNDOJ to assign the most experienced and knowledgeable attorney to an ICWA case in Arizona and seek *pro hac vice* admission, if needed.”

...

“Tribes should not be prevented from participating in ICWA cases, solely because their in-house attorneys are not licensed in the State of Arizona. Many tribes, like the Navajo Nation, have ICWA cases in multiple states across the country. Requiring tribal legal counsel to become licensed in each jurisdiction or hire local counsel is cost prohibitive and for tribes with less resources, it effectively prevents them from participating at all. This is contrary to the intent and goals of ICWA.

The proposed rule only eliminates the financial burdens for out-of-state tribal attorneys to participate in ICWA cases. The rule is properly limited in scope and will not adversely affect the legal profession and in fact, could improve overall legal representation in ICWA cases. Further, the proposed rule is consistent with the ICWA which provides an absolute right for a tribe to intervene in any state court proceeding. It also eliminates the need for any federal preemption analysis if a tribe is denied the right to participate through their tribal attorneys.”

Jason Croxton, President
Native American Bar Association of Arizona
Phoenix, Arizona 85001
jcroxton@wildhorsepass.com

&
Patty Ferguson-Bohnee on behalf of the Native American Bar Association of Arizona
Beus Center for Law and Society
Phoenix, AZ 85004-4467
pafergus@asu.edu

“Phoenix has One of the Largest Urban Native American Populations in the United States

Arizona is home to 309,580 Native Americans—4.5% of Arizona’s total population—and to 22 tribal communities.⁴ Maricopa County is also home to the largest population of Native Americans in the country.⁵

⁴ ARIZONA COMMERCE AUTHORITY, DEMOGRAPHICS (CENSUS DATA), <https://www.azcommerce.com/oeo/population/demographics-census-data/> (last visited Apr. 16, 2020). While all out-of-state Tribes are affected by the *pro hac vice* rules, it is important to note that there are also several Tribal communities that exist within Arizona and one or more other states. For example, the Navajo Nation exists in Arizona, Utah, and New Mexico; Quechan exists in both Arizona and California; the Zuni Pueblo exist in both Arizona and New Mexico; and the Fort Mohave exist in Arizona and California. Where one of those Tribes has attorneys that are barred in only another state, those attorneys would also be subject to the *pro hac vice* rules even though the Tribes exist partly within the state of Arizona.

⁵ David Meek, *Maricopa County Tops List of U.S. Counties with Largest Native American Population*, THE ARIZONA REPORT (Feb. 22, 2019), <https://arizonareport.com/maricopa-county-largest-native-american-population/>.

However, 5.2 million Native Americans live in the US⁶ and there are 574 federally recognized tribes in the country.⁷ Tribal members from across the country make Arizona home. Many tribal citizens moved to Arizona during the federal relocation program, to attend boarding school, or more recently, to attend school or work. For example, in the Phoenix area alone after relocation, there were “almost 200 Dakota Sioux, approximately 100 Minnesota Chippewas, 100 Kiowas, about 175 Creeks, 100 Choctaws, several hundred Cherokees, several hundred Pueblos, and smaller numbers of Shawnees, Blackfeet, Pawnees, Cheyennes, Iroquois, Tlingit, Yakimas and other Indians from far away states.”⁸ “

...

“By exempting attorneys from paying pro hac vice fees and requiring association with local counsel, this rule change will remove one of the barriers that prevents Tribes from exercising their federal right of intervention in state court child custody proceedings that are subject to ICWA.”

...

“These benefits—to Tribes, to children, and to parents—fail to accrue where pro hac vice fees or a requirement to associate with local counsel inhibit Tribal representation. By enacting this proposed rule change, the corresponding increase in Tribal representation in ICWA proceedings would ensure that these benefits accrue in a greater number of ICWA proceedings within Arizona, specifically those proceedings that involve children who are members of or eligible for membership in Tribes who lack representation by an Arizona attorney.”

1) Tribes Should be Exempt from Paying Fees

...

“To ensure that the rights of Indian families, Indian children, and the Tribes themselves were protected, Congress established a right for Tribes to intervene in child custody proceedings that are governed by ICWA—foster-care placements, termination of parental rights, pre-adoptive placements, or adoptive placements.⁹ This federal right applies to all Tribes equally, regardless of their location or their attorneys’ bar memberships.

a) States are in the Best Position to Ensure Uniform Application of ICWA’s Protections

“While ICWA created a federal right for Tribes to intervene in certain child custody proceedings, ICWA does not provide funding for the costs associated with exercising that right. Furthermore, the Department of the Interior does not allow Tribes to use federally appropriated funds for retention of private counsel.¹⁰ While there are exceptions to this rule, intervention in ICWA proceedings is not one of those exceptions.¹¹”

... “For a Tribe without an Arizona-barred attorney with dozens of cases in Arizona courts, such as the Cherokee, (see Section 4.c below) the result is several thousand dollars in pro hac vice fees. Furthermore, an applicant may be denied for repeated appearances.¹² This is especially problematic for Tribes with a large population of Tribal citizens who reside in Arizona. Thus, when it comes to ICWA proceedings in Arizona courts, Tribes without an Arizona-barred attorney are not merely at a disadvantage; the federally

⁶ United States Census Bureau, *The American Indian and Alaska Native Population: 2010*, C2010BR-10 (Jan. 2012), <https://www.census.gov/history/pdf/c2010br-10.pdf>.

⁷ Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 85 FR 5462-01, Jan. 30, 2020.

⁸ Joyotpaul Chaudhuri, URBAN INDIANS OF ARIZONA: PHOENIX, TUCSON, AND FLAGSTAFF 22 (1974).

⁹ *Id.* at 4.

¹⁰ 25 C.F.R. 89.40.

¹¹ 25 C.F.R. 89.41.

¹² Ariz. R. Sup. Ct. 39(e).

guaranteed right of intervention may be completely infringed by the combination of pro hac vice fees, the requirement of limited appearances, and the costs of association with local counsel.

2) Pro Hac Vice Costs Limits Tribal Participation

- a) Many Tribes Suffer from a General Lack of Resources
- b) Lack of Knowledge About ICWA in the Legal System
- c) Tribal-Specific Data Shows How Tribes Are Inhibited from Participating in ICWA Proceedings:
Cherokee Example

3) Solutions: What Other States Have Done

- a) Washington, APR 8
- b) Nebraska, NRS § 43-1504
- c) Oregon, UTCR 3.170
- d) Michigan, MCR 8.126
- e) California, Rules of Court 9.40(g)
- f) Wisconsin, SCR 10.03
- g) Minnesota, Rules of Juvenile Protection Procedure 3.06; Adoption Rule 3.09

“Without the rule change, Arizona may not be fully compliant. Because states are in the best position to remedy this problem, it is incumbent upon the Supreme Court to approve this rule change.”

April E. Olson
Rothstein Donatelli LLP
Tempe, AZ 85281
aeolson@rothsteinlaw.com

... “I have primarily provided representation to Indian tribes in ICWA cases, although I have also represented families and parents on occasion. I have been denied the right to represent my client, an Indian tribe, in an ICWA case in another state jurisdiction. I have been required to hire, at great expense to the tribe, local counsel and seek pro hac vice status in order to represent the interests of an Indian tribe in another state. I have also observed my colleagues be denied the right to represent a tribe in an ICWA case and heard similar stories from other ICWA attorneys.

In 2017 I was hired to represent an Indian tribe from another state in an Arizona child custody proceeding. I was hired after a Maricopa County Superior Court Judge denied the tribe’s legal counsel the right to participate in the proceeding. In this case, the Judge refused to accept the out-of-state tribe’s motion to intervene and transfer, until it was filed by an Arizona licensed attorney. This denial came on the eve of a severance trial in a case in which the State had failed to provide notice to the tribe under the ICWA for over a year. Had I not been hired and quickly moved to intervene, the parental rights to the children could have been terminated and the Indian tribe’s connection to these children could have been forever lost. The out-of-state tribes legal counsel in this case was not licensed in Arizona but had practiced law for over 15 years and handled numerous ICWA cases.”

... “Many tribe have ICWA cases in multiple states across the country. Requiring tribal legal counsel to become licensed in each jurisdiction is cost prohibitive and for tribes with less resources, it effectively prevents them from participating.”

...

“Further, some courts have held that federal law preempts state statutes that require a tribe to have a licensed attorney to participate in an ICWA case. See *In re Interest of Elias*, 277 Neb. 1023 (Neb. 2009)...; *State ex rel. Juvenile Dept. of Lane County v. Shuey*, 119 Or.App. 185 (1993).”

“Finally, I note that other states have adopted similar rules including Michigan, MCR 8.126(B), Oregon, UTCR 3.170, Nebraska, Neb. Rev. Stat. 43-1504(3), Washington, APR 8(b)(6), California, California Rules of Court 9.40(g), and Wisconsin, SCR 10.03(4).”

OFFICE OF THE GOVERNOR

Bill Anoatubby, Governor

The Chickasaw Nation

Ada, Oklahoma 74821

<http://www.chickasaw.net>

...

“The Chickasaw Nation currently has almost 60 ICWA cases pending in state courts outside of Oklahoma, including Arizona. Additionally, there are over 1,400 Chickasaw citizens living in Arizona and 316 of them are Chickasaw minor children. The proposed amendment would remove barriers to meaningful tribal participation in ICWA cases occurring in Arizona courts which would result in better outcomes for Chickasaw citizens and reduce the need for lengthy and expensive appeals.

The Chickasaw Nation's ICWA attorney is licensed to practice law in the state of Oklahoma. The proposed rule change would allow her to fully participate and assist the child welfare worker in Arizona as needed without the expense of associating with local counsel or endangering her Oklahoma license by practicing law in Arizona without an Arizona law license.”